May 5, 2010

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor, Room N-5655
200 Constitution Avenue, NW
Washington, DC 20210

Attention: 2010 Investment Advice Proposed Rule

The American Society of Pension Professionals & Actuaries (ASPPA), the Council of Independent 401(k) Recordkeepers (CIKR), and the National Association of Independent Retirement Plan Advisors (NAIRPA), appreciate the opportunity to comment on the newly proposed regulation relating to the provision of investment advice to participants and beneficiaries issued on March 2, 2010.

ASPPA is a national organization of more than 7,500 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines including consultants, administrators, actuaries, accountants, and attorneys. The large and broad-based ASPPA membership gives it unusual insight into current practical problems with the Employee Retirement Income Security Act and qualified retirement plans with a particular focus on the issues faced by small- to medium-sized employers. ASPPA membership is diverse and united by a common dedication to the private retirement plan system.

CIKR is a national organization of 401(k) plan service providers. CIKR members are unique in that they are primarily in the business of providing retirement plan services as compared to financial services companies who primarily are in the business of selling investments. The independent members of CIKR offer plan sponsors and participants a wide variety of investment options from various financial services companies without an inherent conflict of interest. By focusing their businesses on efficient retirement plan operations and innovative plan sponsor and participant services, CIKR members are a significant and important segment of the retirement plan service provider marketplace. Collectively, the members of CIKR provide services to approximately 68,000 plans covering 2.8 million participants and holding in excess of $120 billion in assets.

NAIRPA is a national organization of firms which provide independent investment advice to retirement plans and participants. NAIRPA's members are registered

investment advisors whose fees for investment advisory services do not vary with the investment options selected by the plan or participants. In addition, NAIRPA members commit to disclosing expected fees in advance of an engagement, reporting fees annually thereafter and agreeing to serve as a plan fiduciary with respect to all plans for which they serve as a retirement plan advisor.

Background

The consequences of concentrated investments, made without regard to risk tolerance or investment horizon, can be dire for participants and beneficiaries who often lack access to professional, prudent investment guidance. The statutory exemption in the Pension Protection Act of 2006 (PPA) will make it more likely that participants and beneficiaries may obtain assistance in diversifying investments and appropriately reflecting their own risk tolerances and investment horizons in asset allocations. ASPPA, CIKR and NAIRPA strongly support the purpose of this timely legislation.

However, the non-statutory class exemption that was promulgated in conjunction with withdrawn final regulation (*i.e.*, the portion that does not relate to the statutory exemption from the prohibited transaction rule enacted in PPA) would not have furthered that purpose. We believe it potentially would have exposed participants and beneficiaries to conflicted investment advice without sufficient protection from the effects of an adviser's conflicts of interest. Furthermore, this exemption is contrary to Congressional intent and we fully support its exclusion from the new proposed rule.

ASPPA, CIKR and NAIRPA are generally supportive of the new proposal. However, we are concerned that the new proposal may unnecessarily interject government regulators into the role of investment advisor by dictating the parameters of what is acceptable in the realm of investment theory. We believe that job is better left to trained and experienced professionals who should be able to apply their considered expertise when either giving investment advice or creating computer models. Our concerns in this regard are discussed in greater detail below.

Discussion

ERISA and the Internal Revenue Code generally prohibit plan fiduciaries from rendering any investment advice to plan participants and beneficiaries that would result in the payment of additional fees to the fiduciaries or their affiliates. PPA §601 provided a statutory prohibited transaction exemption to the rule [codified at ERISA §§ 408(b)(14) and 408(g) and IRC §§ 4975(d)(17) and 4975(f)(8)] for certain transactions that may occur in connection with the provision of "eligible investment advice" by a "fiduciary

adviser," subject to specific requirements. In particular, the final PPA investment advice provision allowed two specific permissible investment advice exceptions: (1) "fee-leveling" arrangements; and (2) certified computer model arrangements.

When the original proposed investment advice regulation was issued by the DOL on August 22, 2008, interpreting PPA §601, a separate prohibited transaction class exemption (Class Exemption) was also issued that provided relief for certain transactions that went beyond the scope of relief contemplated in the statutory language. The DOL incorporated the separate Class Exemption into the original version of the Final Regulation which was published on January 21, 2009, and withdrawn on November 20, 2009.

The withdrawn Class Exemption clearly went beyond the scope of the investment advice prohibited transaction relief as enacted by PPA. Congress spent a considerable amount of time examining and debating the optimum way to encourage employers to provide investment advice and education to their employees without removing the carefully crafted protections from conflicted advice originally put in place over 30 years ago. ASPPA, CIKR and NAIRPA fully support the policy behind making professional prudent investment advice more easily available to plan participants and beneficiaries. However, we believe that working Americans should not have their retirement assets exposed to conflicted investment advice where the adviser has a financial interest in what investment choices to recommend, regardless of what disclosure is being provided. If the Class Exemption had not been withdrawn, there is a high likelihood that plan participants and beneficiaries would have been subjected to investment advice that is not in their best interest as a result of conflicts of interest that could benefit the fiduciary adviser. For this reason, ASPPA, CIKR and NAIRPA fully support the DOL's withdrawal of the Class Exemption portion of the original Final Regulation. The enactment of ERISA §§ 408(b)(14) and 408(g) reflect Congressional desire to provide very limited relief for providing conflicted investment advice. We believe the new proposal issued on March 2, 2010, more closely reflects what Congress intended.

In the new proposal, the Department invited comment from interested persons on "the conditions applicable to investment advice arrangements that use computer models under proposed § 2550.408g-1(b)(4)(i)." The request for comment then enumerates a list of thoughtful questions that attempt to surface important issues pertaining to the notion of "generally accepted investment theories." We appreciate the Department's desire to understand the terms by which computer models, or any other delivery system for investment advice, can and should be constrained to increase the chances of successful participant investment outcomes. However, we do not believe that the Department, nor any other legislative or regulatory entity, should be in the business of ratifying or endorsing any particular investment theory or practice.

Rather than explicitly or implicitly endorsing a particular theory or methodology, ASPPA, CIKR and NAIRPA would instead like to encourage the Department to continue to hold up a certain set of core fiduciary values that have, over time, proven to be generally accepted and deemed to be prudent. Such values might include the need for portfolio diversification, investing for the long term, the payment of only reasonable fees for investment services and the need to keep potential conflicts of interest with respect to the advice given to a minimum. There may be others as well. While particular investment strategies and products come and go in our ever more rapidly evolving industry, these core values remain the same and provide benchmarks, or standards, against which all theories, styles and methodologies can be measured.

None of these values, employed in a vacuum, would provide a prudent basis for decision-making. They work interdependently and in different combinations in different scenarios. Just because a given portfolio is diversified does not make it prudent if it is also expensive and riddled with conflicts of interest for the manager. The fact that a given investment is less expensive than another competing investment is meaningless if that original investment is not appropriate for a given investor or portfolio.

Investment theories that attempt to advance one particular methodology, *e.g.* active vs. passive management, also should not be preferred or excluded. Both can be used within prudent fiduciary values and both can also be structured in a manner which violates them. Fundamental to our securities laws is the notion that "past performance is no guarantee of future results." That is no less true of passive strategies than it is of active investment strategies.

The proposed regulation asserts that, with respect to the computer model, advice should not "inappropriately distinguish among investment options within a single asset class on the basis of a factor that cannot confidently be expected to persist in the future." The expectation of persistence is, by definition, a judgment call on which competing, legitimate players will differ. Recent experience with regard to investment returns might lead one to conclude that nothing can confidently be expected to persist in the future based on a factor in the past. Persistence can only be recognized in hindsight. Process, principles and values are the things that can truly, with foresight, be expected to persist. The values and the process with which a prudent fiduciary arrives at the conclusion to employ a given strategy or methodology is what the Department should be emphasizing rather than attempting to dictate the theories themselves.

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These comments were prepared by ASPPA's Department of Labor Sub-committee of the Government Affairs Committee, with input from CIKR and NAIRPA. Please contact

Craig P. Hoffman, General Counsel and Director of Regulatory Affairs, at (703) 516-9300 if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

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